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Kansas v. Colorado, 125 S. Ct. 526 (2004)

COURT REPORTS

FEDERAL COURTS

UNITED STATES SUPREME COURT

Kansas v. Colorado, 125 S. Ct. 526 (2004) (holding the Special Master's recommendation that the United States Supreme Court not appoint a River Master was appropriate; overruling Kansas' objections to the Special Master's recommendations; accepting the Special Master's recommendation; and remitting the case to the Special Master for preparation of a decree).

This case involved a long running dispute between the states of Kansas and Colorado. In 1949, the two states entered into the Arkansas River Compact ("Compact"), whereby the states agreed to divide and apportion the waters of the Arkansas River equitably. In 1985, Kansas alleged Colorado violated Article IV-D of the Compact by depleting river water that otherwise would have been available for Kansas' use. The Special Master appointed under the United States Supreme Court's original jurisdiction agreed with Kansas and recommended the Court conclude Colorado violated Article IV-D of the Compact. The Court followed this recommendation and remanded the case for remedies. That case is commonly known as *Kansas I*. In a subsequent case, *Kansas III*, the Special Master, in his Second and Third Reports, proposed methods for calculating remedies and recommended the Court award prejudgment interest on the damages Kansas incurred from 1969 to 1994 due to Colorado's overuse of water. The Court adopted the recommendations with the exception that prejudgment interest would begin in 1985 rather than 1969. The instant case involved the Special Master's Fourth Report, which resolved the remaining issues from *Kansas I*. Kansas objected to several of the Fourth Report's recommendations.

Kansas first objected to the Special Master's recommendation that the Court not appoint a River Master to decide technical disputes related to the decree. The Special Master advised the Court to retain jurisdiction and permit the Special Master to resolve remaining issues subject to the Court's oversight. Accordingly, the Court denied Kansas' request for a River Master, noting the Court appointed a River Master in only two other cases, and only because it significantly aided in resolving further disputes. The Court reasoned further disputes in this case might require "discretionary, policy-oriented decision-making directly related to underlying legal issues." Thus, the Court concluded

this case differed from those where it had appointed River Masters. The Court also commented that because neither party objected to using arbitration, which the Compact provided for, the need for a River Master, was minimal. Accordingly, the Court denied Kansas' objection.

Kansas next objected to the Special Master's prejudgment interest calculation. The Special Master found Colorado's unlawful water depletion began harming Kansas in 1950. Kansas argued interest should date back to 1950. Colorado argued the Compact did not anticipate interest on unliquidated claims. To resolve this problem, the Special Master divided the prejudgment period into three periods: the Early Period, 1950 to 1968; the Middle Period, 1969 to 1985; and the Late period, 1985 to 1994. The Special Master then awarded prejudgment interest for the Middle Period, resulting in a total damages award of \$38 million. The Court accepted the Special Master's equitable approach, but changed the prejudgment interest period from the Middle Period to the Late Period. In addressing Kansas' complaint, the Court stated its purpose in awarding prejudgment interest was equity, not the compensation of lost investment opportunities. The Court also noted that by not commenting on the Special Master's exemptions of the Early Period, the Court had implicitly accepted the Special Master's scheme. The Court concluded Kansas' contention that prejudgment interest should date back to 1950 ran counter to both the Court's equitable scheme and the Court's damages award, which was slightly more favorable to Colorado than was the Special Master's award.

Kansas also objected to the Special Master's recommendation that the computer model the parties agreed to use to ensure Colorado's future compliance be based on a 10-year measurement period. Kansas argued the Compact prohibited the accumulation of debits or credits on water usage, and a 10-year measurement would result in an averaging of Colorado's water usage that would be equivalent to allowing it to accumulate debits or credits. However, the Court observed that while the Compact proscribed offsetting debits with credits, it failed to define the duration for which to measure a credit. The Court also noted any period of measurement would involve an averaging of use over the measurement period no matter how short the period. Moreover, the Court pointed out the compliance computer model was highly inaccurate at modeling measurement periods of less than 10 years. Finally, the Court concluded that because Colorado law required the use of water replacement plans to minimize depletions, Kansas was unlikely to suffer serious harm due to the 10-year measuring period. On these bases, the Court overruled Kansas' objection to the 10-year measurement period.

The Court similarly overruled Kansas' objection to the Special Master's recommendation that Colorado's Water Court determine the final amount of water replacement plan credits that applied toward Colorado's compact obligations. Kansas claimed the Supreme Court

must oversee all questions essential to resolving interstate disputes. The Court concluded Kansas' argument ignored the full language of the Special Master's recommendation, which made the Colorado Water Court's determination subject to Kansas' right to relief under the Court's original jurisdiction. Accordingly, the Court overruled this objection.

On Kansas' objection, the Special Master found Colorado was in compliance for the years 1997-1999 using a measurement period of longer than one year. The Court overruled Kansas' objection to the Special Master's finding because the Court already ruled against Kansas regarding the 10-year measurement period discussed above.

The Court also ruled against Kansas on fifteen items, which the Special Master refused to make recommendations on, and which Kansas grouped in three categories: (1) disputed computer model calibration issues, (2) disputed 1997-1999 accounting issues, and (3) disputed future compliance issues. The Court concluded the issues addressed by category two were moot under the Court's ruling on the 1997-1999 compliance issue discussed above. As for categories one and three, the Court stated that with the passage of time, the states would learn more about the computer model's strengths and weaknesses and, because the Court retained jurisdiction over the case, it could direct the Special Master to address these remaining issues later.

Accordingly, for the reasons discussed above, the Court accepted the Special Master's recommendations, overruled Kansas' objections, and recommitted the case to the Special Master for preparation of a decree.

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UNITED STATES CIRCUIT COURTS

FIRST CIRCUIT

Alliance to Protect Nantucket Sound, Inc. v. United States Dep't of the Army, 395 F.3d 105 (1st Cir. 2005) (holding the Army Corps of Engineers properly exercised jurisdiction and followed proper procedures to issue a permit for an offshore data tower on the Outer Continental Shelf).

On August 19, 2002, the United States Army Corps of Engineers ("Corps") issued a navigability permit to Cape Wind Associates ("Cape Wind") for the purpose of erecting an offshore data tower in an area of Nantucket Sound located on the federally controlled Outer Continental Shelf ("OCS"). The tower's purpose was to gather data to determine the feasibility of locating a wind energy plant in Nantucket Sound. After a public notice and comment period, the Corps issued Cape Wind the permit. The Corps accompanied the permit with an